

# Buy American Provisions



# Buy American Provisions

- Defining American-made
- Categorical/National waivers
- Project-specific waivers

# Defining American-made

# ARRA Includes Buy American Requirement

- Section 1605(a) of ARRA requires assistance recipients to use domestic iron, steel, and manufactured goods that are produced in the U.S. This is the expected means of compliance.
- Section 1605(b) provides for a waiver of this requirement under circumstances identified and limited in that provision
- ARRA applies to “all I/S/MG used in a project,” so entire project must comply with §1605 if any ARRA funds are used

# Translation

- The expectation is that you will procure American made goods for your entire project
  - Even if it is only partially funded by ARRA
- Waivers are available for specific reasons, as an exception
- Manufactured goods seem to be the area of most confusion

How Do We Know a  
Manufactured Good is American-  
made?

**Use the substantial  
transformation test**

# Notes on Substantial Transformation

- Assistance recipient's responsibility to make determinations
- Always case-by-case
- Involves complex and meaningful (rather than minimal or simple) operations
- Does not require sub-components to be American-made

# Questions for Determining Whether Substantial Transformation Has Occurred in the U.S.

Question	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and		
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component) <i>[Questions 2.a., 2.b., and 2.c. shown on next slide]</i>		
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful? <i>[Questions 3.a., 3.b., 3.c., 3.d, and 3.e. shown on later slide]</i>		

Substantial transformation has occurred in the U.S.  
if answer yes to either Question 1, 2, or 3



# To Answer Question 2, Ask the Following:

Question	Yes	No
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	✓	
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?		
b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?		
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?	✓	

If answer yes to any of 2a, 2b, or 2c,  
then answer to Question 2 is yes  
(checked answers are for illustration only)

# To Answer Question 3, Ask the Following:

Question	Yes	No
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?	✓	
a. Did the process(es) take a substantial amount of time?	✓	
b. Was(/were) the process(es) costly?		
c. Did the process(es) require particular high level skills?	✓	
d. Did the process(es) require a number of different operations?		
e. Was substantial value added in the process(es)?		

If answer yes to at least two of 3a, 3b, 3c, 3d, or 3e,  
then answer to Question 3 is yes  
(checked answers are for illustration only)

# NOT Substantial Transformation

- **Cosmetic or surface** changes (e.g., painting, lacquering, or cleaning)
- Simply **cutting** a material to length or width (e.g., cutting steel pipe to particular length)
- If all pieces are shipped by one company with the intent of providing all components necessary to be assembled into a functional good (e.g., pump station)

= NOT manufactured in the U.S.

# “Substantial Transformation” May Occur On-site IF...

- Manufacturer brings all components of the good to the site and does so in normal course of business
  - Ensures that this is not an attempt to game Buy American rules
- Manufacturer does all the work onsite
  - May use sub for this only if manufacturer does so already in the normal course of business
- Answered yes to Questions 1, 2, or 3 above (i.e., found substantial transformation occurs)
  - Case is strongest if the transformative work must be done onsite (e.g., work includes adjustments, calibration, etc required to meet performance spec)

# Handout

- “Buy American Roles and Required Documentation” is designed to explain the actions and documentation that are required of assistance recipients, A/E’s, and construction contractors through the process

Buy American Roles and Required Documentation				
		Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
1. Planning and design	Actions	<ul style="list-style-type: none"> <li>• Work closely with A/E's so BA is included in design</li> <li>• Include language in contract with A/E's requiring A/E's to provide information that may be necessary for design waivers</li> </ul>	<ul style="list-style-type: none"> <li>• Make design decisions that take into account Buy American</li> <li>• Identify components that will likely require a waiver</li> <li>• Help assistance recipients begin the development of necessary waivers</li> </ul>	N/A
	Documentation	<ul style="list-style-type: none"> <li>• Information that may be included in a waiver application</li> </ul>	<ul style="list-style-type: none"> <li>• Information that may be included in a waiver application</li> </ul>	N/A
2. Preparing for bidding	Actions	<ul style="list-style-type: none"> <li>• Work closely with A/E's so BA is included in spec</li> </ul>	<ul style="list-style-type: none"> <li>• Spec component parameters that require American-made</li> <li>• Identify components that will likely require a waiver</li> </ul>	<ul style="list-style-type: none"> <li>• Alert primary vendors you will be bidding on a project that requires American-made goods</li> <li>• Be on the lookout for new vendors, suppliers, or manufacturers of American-made goods</li> </ul>
	Documentation	N/A	<ul style="list-style-type: none"> <li>• Records of design decisions made due to performance parameters</li> </ul>	<ul style="list-style-type: none"> <li>• List and specifications of American-made goods provided by vendors, suppliers, or manufacturers</li> </ul>
3. Bid process	Actions	<ul style="list-style-type: none"> <li>• Ensure RFP requires bidders to comply with Buy American and explain how substantial information is defined and applied and how the waiver process works</li> <li>• Be aware of Buy American during bid evaluation</li> <li>• Ask for more information if one bidder is significantly lower than others</li> <li>• Select a winning bidder that you are confident is capable of managing Buy American</li> </ul>	<ul style="list-style-type: none"> <li>• Respond to all requests for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Identify all iron, steel and manufactured goods necessary for the project</li> <li>• Estimate prices assuming American-made components if possible (see "Buy American and Bid Package Pricing")</li> <li>• Identify components that will likely require a waiver</li> <li>• Submit requests for clarification if necessary</li> <li>• Have a back-up plan in case a waiver is not received</li> </ul>
	Documentation	<ul style="list-style-type: none"> <li>• Clarification provided in response to request for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Reasoning behind clarification provided in response to requests for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Clarification received in response to request for clarification</li> <li>• Information that may be included in a waiver application</li> </ul>

# Key Points

- Consider BA as early as possible
- Include BA clauses in all solicitations, contracts, and subcontracts
- Keep careful records of items procured
- Never assume your project will receive a waiver

# Checking Manufacturers

- Most manufacturers are eager to prove compliance with Buy American
  - Some are too eager
  - Not subject to the same contract penalties as contractors and assistance recipients
- Buy American requirements will mean that you may be dealing with unfamiliar vendors
- Perform due diligence on manufacturers to ensure you are comfortable with their certifications
  - Don't hesitate to ask questions, request references, or do some background research
- Report dishonest practices to the OIG

# Categorical/Nationwide Waivers



# Refinancing Waiver

- Basis: Public Interest
- For projects with debt obligations incurred on or after October 1, 2008 and prior to February 17, 2009 that are refinanced by the SRF using ARRA funds
- Justified by specific ARRA provision that makes eligible projects initially financed within an “in anticipation of ARRA” window

# Refinancing Waiver, continued

- Congressionally-defined window:
  - On or after Oct. 1 = “in anticipation of ARRA”
  - Prior to Feb. 17 = in good faith and without fair notice as to the existence and statutory scope of any Buy American requirement
- To qualify, must have “debt obligations ... incurred” within the window
  - Can sometimes include incurred costs alone
  - Might include certain other types of funding agreements if the commitments of both parties are tantamount to a “debt obligation incurred”

# Bid Waiver

- Basis: Public Interest
- For projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009
- To have waiver cover a project, assistance recipients must also show verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects, such as:
  - High ranking on a priority list
  - Commitment letter from funding agency
- Verifiable basis must show solicitation undertaken in specific anticipation of timely funding (from ARRA or other source)

# Bid Waiver, continued

- Rationale for applying both ends of ARRA window is the same as with refinancing
  - Begins when bid solicitations can properly be considered “in anticipation of ARRA”
  - Limited to time before ARRA signing gave fair notice as to Buy American requirement
- Thus, this waiver does not apply to projects that solicited bids after ARRA signing on February 17
- Waiver is intended to recognize appropriateness of proactive steps States took to encourage SRF projects’ readiness for expeditious construction

# Revised De Minimis Waiver

- Basis: Public Interest
- For *de minimis* incidental components of projects, where they comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project
  - 5% of total materials cost determined from research conducted by EPA
- **CAN BE COMPONENTS YOU KNOW ARE FOREIGN-MADE** as long as they otherwise qualify under the waiver

# Revised De Minimis Waiver, continued

- Assistance recipient determines and retains relevant documentation
- Assistance recipient includes in reports to NH:
  - Types/categories of items to which this waiver is applied
  - Total cost for each type
  - Calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver

# Revised De Minimis Waiver, continued

- The waiver text identifies the following as characteristics needed for items to be covered:
  - “Use of literally thousands of miscellaneous...components” (different items of miscellaneous character)
  - “Generally low cost”
  - Examples include nails, bolts, screws, wire

# If ARRA-Funded Project Is Covered By Categorical Waiver...

- You do not need to apply for an individual waiver
- However, documentation that a project is covered by a categorical waiver *must include all elements required by the waiver*
- Maintain documents in project files



# Project-Specific Waivers

# ARRA Provides Three Bases on Which a Project Specific Waiver May be Granted by EPA

- Applying Buy American is inconsistent with public interest (§1605(b)(1))
- U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
- Inclusion of U.S. iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))

# Basis 1 for Project-Specific Waiver

- Inconsistency with public interest

# Basis 2 for Project-Specific Waiver

- American-made goods are not available in sufficiently available quantity or satisfactory quality:

“Quantity will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.”

# Assistance Recipients Should:

- Ensure that project design specifications do not unnecessarily preclude U.S.-produced iron/steel/manufactured goods (I/S/MG)
- Include bid solicitation provisions and enforceable contract provisions for timely delivery of I/S/MG to ensure expeditious construction under ARRA
- Should make clear bidders' responsibility to document in detail any unavailability of U.S.-produced I/S/MG in response to bid solicitation

# Basis 3 for Project-Specific Waiver

- American-made component will increase total project cost 25%

US EPA Implementation of the Ame... x				
http://www.epa.gov/water/eparecovery/				
Webmail US EPA CW US EPA DW Forum CWSRFtraining.net Webcasts Research TWC Maps M NextBus M 38B Other bookmarks				
Regional Waivers				
Waiver Name	Product Type	State	Approval Date	Federal Register link (GPO)
Auburn, Maine Sewerage District	Ductile iron spring loaded hinged manhole covers and frames	ME	5/13/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-06-22/pdf/E9-14600.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-06-22/pdf/E9-14600.pdf</a>
Claywood Park PSD	Blowers for sequencing batch reactor basins	WV	6/8/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-07-09/pdf/E9-16265.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-07-09/pdf/E9-16265.pdf</a>
Winnepesaukee River Basin Bureau	Air bearing turbo aeration blowers and appurtenances	NH	6/8/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-06-29/pdf/E9-15318.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-06-29/pdf/E9-15318.pdf</a>
Lewiston, ME	Constant flow regulator	ME	7/17/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-07-28/pdf/E9-17937.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-07-28/pdf/E9-17937.pdf</a>
Sharon School, VT	Class A certified UV disinfection units	VT	7/17/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-07-28/pdf/E9-17931.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-07-28/pdf/E9-17931.pdf</a>
Ocean Shores, WA	Resin beads	WA	7/24/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-08-13/pdf/E9-19465.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-08-13/pdf/E9-19465.pdf</a>
Utah Division of Wildlife Resources	Coconut Fiber (coir) Woven Mats	UT	7/25/2009	<a href="http://edocket.access.gpo.gov/2009/pdf/E9-20801.pdf">http://edocket.access.gpo.gov/2009/pdf/E9-20801.pdf</a>
Hooksett, NH	Polyethylene Biofilm chip media	NH	7/29/2009	<a href="http://www.gpo.gov/fdsys/pkg/FR-2009-08-11/pdf/E9-19194.pdf">http://www.gpo.gov/fdsys/pkg/FR-2009-08-11/pdf/E9-19194.pdf</a>
Plymouth Village Water & Sewer District, New Hampshire	6 channel rotary press sludge dewatering unit	NH	8/17/2009	<a href="http://edocket.access.gpo.gov/2009/pdf/E9-20798.pdf">http://edocket.access.gpo.gov/2009/pdf/E9-20798.pdf</a>
Bristol Family Center water System in Bristol, VT; Kids in	NSF-55 Class A certified Ultra			

# EPA Region 1 Review Process

1. Borrower submits waiver request and supporting documentation to [region1waiver@epa.gov](mailto:region1waiver@epa.gov)
  - Must be in Word document (.doc) format
2. Region reviews request for completeness
3. Region forwards request to contractor for technical review
  - Contractor may conduct research to determine whether a similar U.S.-made product is available, or to decide if the specific product is necessary for the project
4. Contractor provides technical report to Region and EPA HQ
5. Region approves or denies the waiver request
6. Region notifies borrower of the decision
7. Approved waiver is published in the Federal Register

*Two-week turnaround goal for review process*



## Appendix 1: Information Checklist for Waiver Request

The purpose of this checklist is to ensure that all appropriate and necessary information is submitted to EPA. Please review this checklist carefully and provide all required information to EPA. This checklist is for informational purposes only and does not need to be included as part of a waiver application.

Items	✓	Notes
<p><b>General</b></p> <ul style="list-style-type: none"> <li>• Waiver request includes the following information: <ul style="list-style-type: none"> <li>— Description of the foreign and domestic construction materials</li> <li>— Unit of measure</li> <li>— Quantity</li> <li>— Price</li> <li>— Time of delivery or availability</li> <li>— Location of the construction project</li> <li>— Name and address of the proposed supplier</li> <li>— A detailed justification for the use of foreign construction materials</li> </ul> </li> <li>• Waiver request was submitted according to the instructions in the memorandum</li> <li>• Assistance recipient made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by language in requests for proposals, contracts, and communications with the prime contractor</li> </ul>		
<p><b>Cost</b></p> <ul style="list-style-type: none"> <li>• Waiver request includes the following information: <ul style="list-style-type: none"> <li>— Price Comparison Worksheet shown in Table 1</li> <li>— Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Worksheet</li> <li>— Supporting documentation indicating that the contractor made a reasonable survey of the market, such as a description of the process for identifying suppliers and a list of contacted suppliers</li> </ul> </li> </ul>		
<p><b>Availability</b></p> <ul style="list-style-type: none"> <li>• Waiver request includes the following supporting documentation necessary to demonstrate the availability, quantity, and/or quality of the materials for which the waiver is requested: <ul style="list-style-type: none"> <li>— Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials</li> <li>— Documentation of the assistance recipient's efforts to find available domestic sources, such as a description of the process for identifying suppliers and a list of contacted suppliers.</li> <li>— Project schedule</li> <li>— Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials</li> </ul> </li> <li>• Waiver request includes a statement from the prime contractor confirming the non-availability of the domestic construction materials for which the waiver is sought</li> <li>• Has the State received other waiver requests for the materials described in this waiver request, for comparable projects?</li> </ul>		

April 28 Guidance Memo  
[www.epa.gov/water/eparecovery](http://www.epa.gov/water/eparecovery)

# Recommended Contents

- Waiver request
  - Cover letter with contact information
  - General description and cost of the project
  - General product information
  - Justification for the waiver request
- Supporting documentation

Buy American Recordkeeping

# Buy American Records

Suggested system: Four-part binder with supporting documentation for:

1. U.S.-made components
2. National waivers
3. Project-specific waivers
4. De minimis components

# Documentation for U.S.-Made Components

- ☐ **Written certifications from manufacturers/suppliers**
- ☐ Invoices
- ☐ Bills of lading
- ☐ Shipping manifests
- ☐ Photographs of Country of Origin labeling
- ☐ Cut sheets (if COO is specified)
- ☐ Photographs of serial numbers (or other ID) cross-referenced with cut sheets
- ☐ Sign-off sheet from contractor showing that materials were inspected upon delivery
- ☐ Documentation for de minimis components in excess of 5%
- ☐ Completed Substantial Transformation checklist

# Documentation for National Waivers

## Refinancing Waiver

- ☐ Copy of the original debt instrument dated between 10/1/08 and 2/17/09
- ☐ Copy of the ARRA assistance agreement refinancing the original debt

# Documentation for National Waivers

## Bid Waiver

- Evidence that solicitation occurred between 10/1/08 and 2/17/09, such as:
  - ☐ Copy of published advertisement
  - ☐ Internet posting
  - ☐ Email distribution
- Evidence of imminent funding, such as:
  - ☐ Commitment letter
  - ☐ Priority List showing high ranking
  - ☐ Statement from the SRF or other source confirming funding (can include budgetary allocations or self-financing)

# Documentation for Project-Specific Waivers (Availability)

- ☐ Project /component specifications
- ☐ Cut sheets for applicable component
- ☐ Project schedule showing when the applicable component is needed
- ☐ RFP/RFI
- ☐ Proposals/bids
- ☐ Delivery dates
- ☐ Copy or record of relevant communications with the prime contractor
- ☐ List of contacted vendors (date, time, summary of conversation)
- ☐ Copy of communications from U.S. suppliers showing non-availability
- ☐ Copy of evaluation criteria and product specification comparisons
- ☐ Commitment letter from non-U.S. producer to supply the product
- ☐ Copy of completed waiver checklist (April 28 memo)
- ☐ Copy of the waiver request as submitted to EPA
- ☐ Copy of the Federal Register notice for the waiver



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# Documentation for Project-Specific Waivers (Cost)

- ☐ Project /component specifications
- ☐ Cut sheets for applicable component
- ☐ Bids/proposals with pricing
- ☐ Project budget with cost breakdown
- ☐ Total project price comparison with foreign and domestic products (with component breakdown)
- ☐ Copy of completed waiver checklist (April 28 memo)
- ☐ Copy of the waiver request as submitted to EPA
- ☐ Copy of the Federal Register notice for the waiver

# Documentation for De Minimis Components



- ☐ Total materials cost
- ☐ List of each de minimis item type, quantity used in the project, and item's total cost
- ☐ Receipts/invoices for de minimis items showing total cost
- ☐ Calculation showing the % cost of de minimis items in comparison to total project cost
- ☐ Copy of report to ARRA on de minimis project components